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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
(HONORABLE JEFFREY T. MILLER)

UNITED STATES OF AMERICA,

Plaintiff,

V.

MANLEY SMITH (2),

Defendant.

Case No.: 08cr1969-JM

Date: September 12, 2008

Time: 1:30 p.m.

**NOTICE OF MOTIONS AND
MOTIONS TO:**

- (1) DISMISS THE INDICTMENT FOR FAILURE TO PRESENT EXCULPATORY EVIDENCE TO THE GRAND JURY AND ORDER DISCLOSURE OF GRAND JURY TRANSCRIPTS;**
- (2) SUPPRESS STATEMENTS;**
- (3) SUPPRESS EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT;**
- (4) SEVER DEFENDANTS;**
- AND,**
- (5) GRANT LEAVE TO FILE FURTHER MOTIONS**

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY; AND
MARK CONOVER, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on September 12, 2008, at 1:30 p.m., or as soon thereafter as counsel may be heard, the accused, Manley Smith, by and through his attorneys, Jason I. Ser and Federal Defenders of San Diego, Inc., will ask this Court to enter an order granting the motions outlined below.

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MOTIONS

Defendant, Mr. Smith, by and through his attorneys, Jason I. Ser and Federal Defenders of San Diego, Inc., pursuant to the United States Constitution, the Federal Rules of Criminal Procedure, and all other applicable statutes, case law and local rules, hereby moves this Court for an order to:

- (1) Dismiss the Indictment for Failure to Present Exculpatory Evidence to the Grand Jury and Order Disclosure of Grand Jury Transcripts;
- (2) Suppress Statements;
- (3) Suppress Evidence Obtained in Violation of the Fourth Amendment;
- (4) Sever Defendants; and,
- (5) Grant Leave to File Further Motions.

These motions are based upon the instant motions and notice of motions, the attached statement of facts and memorandum of points and authorities, and any and all other materials that may come to this Court's attention at or before the time of the hearing on these motions.

Respectfully submitted,

DATED: August 29, 2008

/s/ Jason I. Ser
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UNITED STATES DISTRICT COURT
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**STATEMENT OF FACTS AND POINTS AND
AUTHORITIES IN SUPPORT OF MOTIONS**

I.

STATEMENT OF FACTS¹

Mr. Smith incorporates by reference the statement of facts previously provided to the Court. He provides the following statement in support of the instant motions.

At approximately 1:45 p.m., Ortiz and other agents arrested Mr. Smith at the Wackenhut office at the Border Patrol station. In effecting the arrest, three plain clothed Border Patrol officers entered the office all holding a firearm in one hand, with the weapon at their side pointing downward toward the ground. At least one agent yelled in a loud voice telling Mr. Smith not to move, with at least two of the agents grabbing Mr. Smith, pushing him face down on his desk with hands on the back of his neck and back. By his wrists,

¹ The following statement of facts is based on discovery provided to date. Accordingly, the facts alleged in these motions are subject to elaboration and/or modification at the time these motions are heard. Mr. Smith reserves the right to take a position contrary to the following statement of facts at the motions hearing and at trial. If necessary, Mr. Smith will supplement the instant motion with declarations.

1 his hands were yanked strongly behind his back and handcuffs were put in place. While escorting Mr. Smith
2 out of the building, subsequent to his arrest, Mr. Smith allegedly stated "Oh I know what this is about, I
3 know now."

4 Mr. Smith was escorted on foot to another building on the Border Patrol grounds by the same three
5 officers, in handcuffs, where he remained handcuffed alone in a small room for approximately 40 minutes.
6 After that approximately 40 minute period, Mr. Smith was taken to another small room, where his handcuffs
7 were changed and he was re-handcuffed to a cinder-block positioned on the floor. He remained handcuffed
8 to the cinder-block in that room until just minutes prior to the commencement of the interrogation at
9 approximately 5:47 p.m. Prior to the videotaped interrogation, the undercover agent who had posed as the
10 alien entered the room three to four times and each time asked Mr. Smith if he was ready to tell the truth,
11 ordered him to state what was going on and to admit he was a part of it. The agent would position himself
12 in a chair approximately 1 meter from Mr. Smith; nobody else was present in the room during these
13 interactions. In response to the agent's statements, Mr. Smith made statements. At one point, during one
14 of the interactions, Mr. Smith explained to the agent what he would later state during the videotaped
15 interrogation. Unlike the videotaped statement, however, the undercover agent's questions were not
16 preceded by any warnings pursuant to Miranda v. Arizona, 384 U.S. 436 (1966).

17 At approximately 5:47 p.m., and while being videotaped, agents advised Mr. Smith of his rights
18 pursuant to Miranda, 384 U.S. 436. Mr. Smith purportedly waived his rights and made statements in
19 response to questioning by the agents. During that session, Mr. Smith explained his work schedule on the
20 day of his arrest, including his return to the Border Patrol compound in Chula Vista where he switched from
21 driving a Wackenhut van to a Wackenhut jeep. Just as he began to drive the jeep from the gas pump area
22 of the compound to his office, the bus driven by Transportation Office Hayes arrived. Mr. Saint got off the
23 bus and flagged him down. Mr. Saint tells him he has two prisoners - kickbacks from the port of entry who
24 were not Mexican citizens - he needs to take and loads them into the jeep. Mr. Smith asked if he was taking
25 them to the CHU (a detention building on the compound). Mr. Saint told him no and that they offered him
26 \$5,000. Mr. Smith reacted by saying something along the line of oh really or right, then okay and finally
27 I got my car here. Immediately after telling agents he said this, he explained that Mr. Saint always jokes
28 about such things and that the kickbacks from the border always offer something. Mr. Saint also mentioned

1 something to Mr. Smith about an old landlord. Mr. Saint told the interrogating agents that he was joking
 2 around in telling Mr. Saint he had his car there. In response to the interrogating agent's question
 3 "jokingly?", Mr. Smith stated "Yes, sir." Mr. Smith said that the trip from the gas tanks to his office was
 4 about twelve seconds, that he got out at his office and saw Mr. Saint drive the jeep around the corner in the
 5 direction of the CHU. He then went into his office. Mr. Smith continually told the interrogating agents that
 6 his statement was intended as a joke and he never intended to use or provide the car to Mr. Saint. The
 7 videotape cuts out before the end of the statement by Mr. Smith. All the while during the interrogation,
 8 Mr. Smith remained handcuffed to the cinder-block on the floor.

9 Five to ten minutes after this session, the undercover agent along with another agent returned to the
 10 room where Mr. Smith remained handcuffed to the cinder-block. They ridiculed him, told him he would
 11 lose his job and that the knew how he bought his Jaguar. In response to this, Mr. Smith continued to insist
 12 he was only a witness.

13 II.

14 **THE COURT SHOULD DISMISS THE INDICTMENT FOR FAILURE TO PRESENT** 15 **EXCULPATORY EVIDENCE TO THE GRAND JURY AND ORDER DISCLOSURE OF** 16 **GRAND JURY TRANSCRIPTS**

17 Section 939.71 of the California Penal Code states in pertinent part:

18 Exculpatory evidence; duties of prosecutor

19 If the prosecutor is aware of exculpatory evidence, the prosecutor *shall inform the grand jury*
 20 of its nature and existence. Once the prosecutor has informed the grand jury of exculpatory
 21 evidence pursuant to this section, the prosecutor shall inform the grand jury of its duties
 under Section 939.7. If a failure to comply with the provisions of this section results in
 substantial prejudice, it shall be grounds for dismissal of the portion of the indictment related
 to that evidence.

22 Cal. Pen. Code § 939.71(a) (emphasis added). Pursuant to 28 U.S.C. § 530B(a), entitled ethical standards
 23 for attorneys for the government, "[a]n attorney for the Government shall be subject to State laws and rules,
 24 and local Federal Court rules, governing attorneys in each State where such attorney engages in that
 25 attorney's duties, to the same extent and in the same manner as other attorneys in that State." 28 U.S.C.
 26 § 530B(a). The "shall" language in § 530B(a) makes California ethical obligation to present exculpatory
 27 evidence to a grand jury binding on federal prosecutors at the United States Attorney's Office for the
 28 Southern District of California. Because the government did not present exculpatory evidence to the grand

1 jury in this case, i.e., Mr. Smith's statement to interrogating agents that his comment to Mr. Saint in the
2 Wackenhut Jeep was a joke, and that he never intended to assist with the alleged alien in any manner or with
3 Mr. Saint's completion of the alien smuggling venture, dismissal is warranted.

4 In Johnson v. Superior Court of San Joaquin County, 15 Cal.3d 248 (1975), the California Supreme
5 Court interpreted California Penal Code § 939.7, a precursor to the current § 939.71(a), and the obligations
6 it imposed upon prosecutors seeking indictment before a grand jury. The court held that “when a district
7 attorney seeking an indictment is aware of evidence reasonably tending to negate guilt, he is obligated under
8 section 939.7 to inform the grand jury of its nature and existence, so that the grand jury may exercise its
9 power under the statute to order the evidence produced.” Id. at 254. The state court characterized the grand
10 jury as the “great inquest” between the prosecuting body of government and the citizen; as such, it shall
11 “make accusations only upon sufficient evidence of guilt, and to protect the citizen against unfounded
12 accusation, whether from the government, from partisan passion, or private malice.” Id. To infuse the grand
13 jury’s power “to protect the citizen against unfounded accusation,” the court strictly read a district attorney’s
14 obligations pursuant to Cal. Pen. Code § 939.7 as including the duty to “fully and fairly present” evidence
15 to the grand jury. Id. at 255.

16 The circumstances in Johnson are similar to the facts present in the present case. There, along with
17 a co-defendant, the petitioner had been arrested for the sale of amphetamine tablets to an undercover
18 narcotics agent. Id. at 251. Before his arrest, however, the petitioner had pled guilty in another drug case
19 and received a beneficial sentencing recommendation from the government on the condition that he
20 cooperate in other drug prosecutions. Id. at 252. The petitioner argued that the district attorney failed to
21 present evidence of this agreement to the grand jury and his testimony at a preliminary hearing that he was
22 in the vicinity of the drug sale to inform on the drug dealer. Id. at 252-53. The magistrate court held that
23 this omission was fatal and dismissed the charges. Id. at 252. Based upon its interpretation of § 939.7, the
24 California Supreme Court agreed with the magistrate’s resolution of the conflict.

25 In this case, during the course of interrogation, Mr. Smith informed agents that he thought Mr. Saint
26 was joking about going through with actually smuggling the men in the jeep for the \$5,000 Mr. Saint
27 mentioned. In fact, Mr. Smith indicated that Mr. Saint always joked like that. As a result, Mr. Smith
28 explained that his response about having his vehicle present at the Border Patrol grounds was a joke and

1 as the interrogating agent put it, a flippant remark. Mr. Smith further stated that he never offered to go get
2 his vehicle, that he made a mistake by making that joking comment and had no intention on following
3 through. Accordingly, because the prosecution was aware of this material exculpatory evidence, the grand
4 jury assistant should have so informed the grand jury. Failure to do so constitutes a failure to "fully and
5 fairly present" evidence as required pursuant to California Penal Code § 939.71(a) and violates due process
6 resulting in substantial prejudice. The Court, accordingly, should dismiss the indictment.

7 The government will likely argue that the Supreme Court's decision in United States v. Williams,
8 504 U.S. 36 (1992), is dispositive of whether it must present exculpatory evidence to the grand jury. It
9 would be difficult to imagine a less relevant precedent; Williams was premised upon the lack of a statutory
10 mandate to support the exculpatory evidence rule, while Mr. Smith's motion is based upon precisely the
11 authority lacking in Williams. Here, the State of California has promulgated a rule requiring disclosure of
12 exculpatory evidence and Congress has incorporated that rule. Thus, Williams is distinguishable.

13 Because Williams expressly acknowledged legislative authority to regulate grand jury practice, see
14 id. at 55, it should be of great consequence to this Court in deciding the issue that the California state
15 legislature saw fit to draft and enact just such a disclosure requirement. See Cal. Penal Code § 939.71(a).
16 Congress has applied this rule, among others, to federal prosecutors. See 28 U.S.C. § 530B(a) (applying
17 State rules to attorneys in federal court within the State jurisdiction). Section 530B was enacted in late
18 1998, while § 939.71(a) was codified in mid-1997. Congress, thus, is presumed to enact new law with
19 knowledge of existing statutes. See Whitfield v. United States, 543 U.S. 209, 216 (2005) ("Congress is
20 presumed to have knowledge of the governing rule"); see also Williams v. Taylor, 529 U.S. 420, 434 (2000)
21 (same). Section 939.71(a) placed an affirmative, and mandatory duty, upon the prosecutor to present
22 exculpatory evidence it is aware of to the grand jury. Id. (Section 939.71(a) states that the prosecutor "*shall*
23 *inform the grand jury of its nature and existence*"). Despite the government's repeated claims in the past
24 that it is under no legal obligation to present exculpatory evidence to a federal grand jury panel when
25 seeking an indictment, it cites no case law permitting it to act without regard to the enactment by the
26 California state legislature.

27 In fact, the United States Attorneys' Manual, too, provides precisely what the California legislature
28 does in remarkably similar language.

9-11.233 Presentation of Exculpatory Evidence

In United States v. Williams, 112 S. Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

Available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm#9-11.233.

Further 22 C.F.R. § 77.3, which is entitled "Application of 28 U.S.C. 530B," provides:

In all criminal investigations and prosecutions . . . attorneys for the government shall conform their conduct and activities *to the state rules and laws, and* federal local court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State.

(emphasis added). The express command to conform conduct "to the state rules and laws" in addition to federal ones disposes of the government's argument that § 939.71(a) only applies to state grand juries. If that logic dictated, there would be no discernable need for either the federal regulation of even the statute.

In light of the foregoing arguments Mr. Smith believes that the prosecution was required by federal law - § 530B(a) - as well as state law to have disclosed exculpatory evidence based upon his statements during interrogation. The prosecution plainly possessed such information, but failed to present it.

At the least, grand jury transcripts should be ordered disclosed. The Court may order disclosure of grand jury proceedings "at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury." Fed. R. Crim. P. 6(e)(3)(E)(ii). Mr. Smith has presented a ground for dismissal of the indictment satisfying the rule's requirement.

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1 III.

2 **THIS COURT SHOULD SUPPRESS ANY STATEMENTS MADE BY**
 3 **MR. SMITH**

4 **A. Mr. Smith's Pre-Miranda Statements Must Be Suppressed Because They Were**
 5 **Elicited As the Result of Custodial Interrogation and Were Involuntary.**

6 The prosecution may not use statements, whether exculpatory or inculpatory, stemming from a
 7 custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective
 8 to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Custodial
 9 interrogation is questioning initiated by law enforcement officers after a person has been taken into custody
 10 or otherwise deprived of his freedom of action in any significant way. Id. See Orozco v. Texas, 394 U.S.
 11 324, 327 (1969). Once a person is in custody, Miranda warnings must be given prior to any interrogation.
 12 See United States v. Estrada-Lucas, 651 F.2d 1261, 1265 (9th Cir. 1980). Those warnings must advise the
 13 defendant of each of his or her "critical" rights. United States v. Bland, 908 F.2d 471, 474 (9th Cir. 1990).

14 In order to be voluntary, a statement must be the product of a rational intellect and free will.
 15 Blackburn v. Alabama, 361 U.S. 199, 208 (1960). In determining whether a defendant's will was overborne
 16 in a particular case, the totality of the circumstances must be considered. Schneckloth v. Bustamonte, 412
 17 U.S. 218, 226 (1973). Some factors taken into account have included the youth of the accused, his lack of
 18 education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length
 19 of the detention, the repeated and prolonged nature of the questioning, and the use of physical punishment
 20 such as the deprivation of food or sleep. Id. The fact that the statement occurred subsequent to the six-hour
 21 safe harbor period also is of consequence. See 18 U.S.C. § 3501.

22 A confession is deemed involuntary whether coerced by physical intimidation or psychological
 23 pressure. Townsend v. Sain, 372 U.S. 293, 307 (1962). "The test is whether the confession was `extracted
 24 by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight, [or] by
 25 the exertion of any improper influence.'" Hutto v. Ross, 429 U.S. 28, 30 (1976) (quoting Bram v. United
States, 168 U.S. 532, 542-43 (1897)). Accord, United States v. Tingle, 658 F.2d 1332, 1335 (9th Cir. 1981).

26 Because the government failed to comply with the former requirement - that Mr. Smith first be
 27 advised pursuant Miranda - all of Mr. Smith's pre-Miranda statements must be suppressed.

1 Additionally, all pre-Miranda statements (including the one made at the time of arrest) were
 2 involuntary in light of the manner of arrest, i.e., three agents in a small office, guns drawn and in hand, and
 3 the physical force used to effect the arrest. The prolonged, isolated detention, while Mr. Smith was
 4 handcuffed to a cinder-block on the floor for more than several hours, created a coercive atmosphere. The
 5 harassing recitations by the undercover agent in the room with Mr. Smith that elicited responses from him
 6 prior to any Miranda warnings only compounded this atmosphere. Furthermore, this interrogation began
 7 with Mr. Smith still in handcuffs attached to a cinder-block on the floor. Finally, as is clear from
 8 Mr. Smith's statement to the agents, he had never been in position before because he had never been
 9 arrested.

10 **B. The Court Must Suppress Mr. Smith's Alleged Post-*Miranda* Statements.**

11 **1. The Interrogating Agent's Pre-*Miranda* Interrogation Violated *Seibert***
 12 **and Resulted in Involuntary Statements.**

13 A defendant's post-Miranda statements may be inadmissible if law enforcement officers use a two-
 14 step interrogation process. See Missouri v. Seibert, 542 U.S. 600, 617 (2004). A two-step interrogation
 15 involves eliciting an unwarned confession, administering the Miranda warnings and obtaining a waiver of
 16 Miranda rights, and then eliciting a repeated confession. See id. at 609-10. If the interrogators deliberately
 17 employ the two-step strategy, the district court must suppress post-warning statements unless the
 18 interrogators take curative measures to apprise the defendant of his rights; if the two-step method is not
 19 deliberate, the post-warning statements are admissible if voluntarily made. Id. at 622 (Kennedy, J.,
 20 concurring); see also United States v. Williams, 435 F.3d 1148, 1157-58 (9th Cir.2006) (Justice Kennedy's
 21 concurrence in Seibert is the Court's holding because it is narrowest grounds with which majority of the
 22 Court would agree).

23 In Williams, the Court candidly stated that "[o]nce a law enforcement officer has detained a suspect
 24 and subjects him to interrogation . . . there is rarely, if ever, a legitimate reason to delay giving a Miranda
 25 warning until after the suspect has confessed." Id. at 1159 (emphasis in original).. Indeed, "the most
 26 plausible reason for the delay in an *illegitimate* one, which is the interrogator's desire to weaken the
 27 warning's effectiveness." Id. (emphasis in original). The effect of the two-step interrogation is to minimize
 28

1 the meaning of "midinterrogation" Miranda warnings because "inculpatory statements have already been
2 obtained." Id. at 1159-60.

3 Whether interrogators acted deliberately in applying a two-step method interrogation is critical when
4 assessing the effectiveness of Miranda. Deliberateness may be found if "objective evidence and any
5 available subjective evidence, such as an officer's testimony, support an inference that the two-step
6 interrogation procedure was used to undermine the Miranda warning." Id. at 1158. Objective evidence
7 includes "the timing, setting and completeness of the prewarning interrogation, the continuity of police
8 personnel and the overlapping content of the pre-and post-warning statements." Id. at 1159 (citing Seibert,
9 542 U.S. at 615).

10 "When an interrogator has deliberately employed the two-step strategy, Seibert requires the court
11 then to evaluate the effectiveness of the midstream Miranda warning to determine whether the postwarning
12 statement is admissible." Williams, 435 F.3d at 1160 (citing Seibert, 542 U.S. at 615). The Court must
13 consider "objective circumstances . . . 'bear[ing] on whether Miranda warnings delivered midstream could
14 be effective enough to accomplish their object'" and whether any curative measures "ensure[d] that a
15 reasonable person in the suspect's situation would understand the import and effect of the Miranda warning."
16 Williams, 435 F.3d at 1160 (quoting Seibert, 542 U.S. at 622). The circumstances include "(1) the
17 completeness and detail of the prewarning interrogation, (2) the overlapping content of the two rounds of
18 interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel,
19 (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous
20 with the first and (6) whether any curative measures were taken." Id.

21 Here, there is no question that the interrogating agents employed a deliberate two-step interrogation
22 in securing Mr. Smith's waiver of Miranda and that no curative measures "ensure[d]" that he would have
23 understood his Miranda rights. As to the former, most of the factors identified in Williams support a finding
24 of deliberateness on the part of the agents. First, though not in any reports, unsurprisingly, Mr. Smith's
25 interrogation at the hands of the undercover agent covered the same topics addressed during the post-
26 Miranda, videotaped interrogation. In fact, the agents in both sessions questioned him about the events of
27 that day leading to his arrest, including the seconds long trip in the Wackenhut jeep with Mr. Saint, the
28 undercover agent and the alleged alien, and Mr. Smith told the undercover agent the same things he told the

agents during the videotaped interrogation. Thus, the first two factors in Williams militate in Mr. Smith's favor. The interrogation with the undercover agent began and ended sometime between approximately 2:30 p.m. and 5:47 p.m. The agents began the videotaped interrogation at 5:47 p.m., in the exact same room. During the interim, which lasted at most just hours, Mr. Smith remained handcuffed to the cinder-block in the same interrogation room. Thus, for all intensive purposes, the two interrogation sessions were successive and uninterrupted. Furthermore, the continuity of police personnel is irrefutable. Although the undercover agent was not present during the videotaped session, that agent and the two agents present in the room during the videotaped session all are Border Patrol agents. They all work for the same government agency and all had the same goal in this case. Their focus remained on Mr. Smith both before and after Miranda was provided. Thus, the third and fourth factors, too, militate in Mr. Smith's favor.

No curative measures were taken. The agents never told Mr. Smith that his pre-Miranda statement would be inadmissible. They never told him that the questioning post-Miranda was separate and distinct from the first round of interrogation. The videotaped statement bears this out. Finally, the agents' apparently knew of their obligation to provide Miranda warnings to Mr. Smith. They brought with them to the interrogation room a copy of the advice of rights card from which one read the warnings. Their forethought in doing so is highly indicative of an intent to get Mr. Smith talking, and if possible confessing, before giving him Miranda.

The objective facts make it apparent that the agents deliberately chose not to provide Mr. Smith with his Miranda warnings prior to interrogating him. Accordingly, the question becomes whether Miranda as given midstream were effective. All the same objective facts discussed above militate for the conclusion that the warnings were ineffective. Additionally, the agents appeared to have treated the second round of interrogation as continuous with the first. As indicated above, there was little break taken during the course of the two interrogations and Mr. Smith remained handcuffed in the same position between each round.

These circumstances completely negate the comprehensibility and efficacy of the Miranda warnings to the point that a reasonable person in Mr. Smith's shoes would not have understood them to convey a message that he retained a choice about continuing to talk to the same agents.

Accordingly, the Court should suppress not only the pre-Miranda statements as discussed above, but any and all post-Miranda statements based upon the holding in Seibert and Supreme Court's chastisement of law enforcement's "question-first" strategy.

2. Alternatively, the Government must Still Prove That Miranda Warnings Were Properly Administered Prior to the Second Interrogation Session.

Even if the Court denies Mr. Smith's arguments based upon Seibert, the government still must demonstrate the use of procedural safeguards effective to secure the privilege against self-incrimination. Miranda v. Arizona, 384 U.S. 436, 444 (1966). Until that is done, post-Miranda statements remain inadmissible.

3. Further, the Government Must Demonstrate That Any Alleged Waiver of Mr. Smith's Rights Was Voluntary, Knowing, and Intelligent.

When interrogation occurs without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant intelligently and voluntarily waived his privilege against self-incrimination and his right to retained or appointed counsel. Miranda, 384 U.S. at 475. It is undisputed that, to be effective, a waiver of the right to remain silent and the right to counsel must be made knowingly, intelligently, and voluntarily. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). The standard of proof for a waiver of these constitutional rights is high. Miranda, 384 U.S. at 475. See United States v. Heldt, 745 F.2d 1275, 1277 (9th Cir. 1984) (the burden on the government is great, the court must indulge every reasonable presumption against waiver of fundamental constitutional rights).

The validity of the waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused. Edwards v. Arizona, 451 U.S. 477, 472 (1981); Johnson v. Zerbst, 304 U.S. 458, 464 (1983). See also United States v. Heldt, 745 F.2d at 1277; United States v. McCrary, 643 F.2d 323, 328-29 (9th Cir. 1981).

In Derrick v. Peterson, 924 F.2d 813 (9th Cir. 1990), the Ninth Circuit confirmed that the issue of the validity of a Miranda waiver requires a two prong analysis: the waiver must be both (1) voluntary, and (2) knowing and intelligent. Id. at 820. The voluntariness prong of this analysis "is equivalent to the voluntariness inquiry under the [Fifth] Amendment" Id. See infra pages 10-11.

1 The second prong, however, requiring that the waiver be "knowing and intelligent," mandates an
 2 inquiry into whether "the waiver [was] made with a full awareness both of the nature of the right being
 3 abandoned and the consequences of the decision to abandon it." Id. at 820-21 (quoting Colorado v. Spring,
 4 479 U.S. 564, 573 (1987)). This inquiry requires that the court determine whether "the requisite level of
 5 comprehension" existed before the purported waiver may be upheld. Id. Thus, "[o]nly if the 'totality of the
 6 circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of
 7 comprehension may a court properly conclude that the Miranda rights have been waived." Id. (quoting
 8 Colorado v. Spring, 479 U.S. at 573) (emphasis in original) (citations omitted)).

9 Under prevailing Ninth Circuit law, the Government bears the burden of demonstrating a Miranda
 10 waiver by clear and convincing evidence. See Schell v. Witek, 218 F.3d 1017 (9th Cir. 2000) (en banc)
 11 (constitutional rights may ordinarily be waived only if it can be established by clear and convincing
 12 evidence that the waiver is voluntary, knowing, and intelligent) (citations omitted). Moreover, this Court
 13 must "indulge every reasonable presumption against waiver of fundamental constitutional rights." Id.
 14 (citations omitted). Unless and until the prosecution meets its burden of demonstrating through evidence
 15 that adequate Miranda warnings were given and that the defendant knowingly and intelligently waived his
 16 rights, no evidence obtained as result of the interrogation can be used against the defendant. Miranda, 384
 17 U.S. at 479.

18 Until the government meets its evidentiary burden of showing that the Miranda warnings were
 19 sufficient or that the Miranda rights were knowingly or intelligently waived, the statements obtained from
 20 Mr. Smith must be suppressed. In light of the events surrounding his arrest as discussed herein, as well as
 21 the pre-Miranda questioning and hours long delay before Miranda with Mr. Smith handcuffed to a cinder-
 22 block on the floor, he believes he has at least set forth facts to warrant a hearing on the matter or justify
 23 suppression.

24 **4. Any Post-Miranda Statements by Mr. Smith Were Involuntary.**

25 Even when the procedural safeguards of Miranda have been satisfied, a defendant in a criminal case
 26 is deprived of due process of law if the conviction is founded upon an involuntary confession. Arizona v.
 27 Fulminante, 499 U.S. 279 (1991); Jackson v. Denno, 378 U.S. 368, 387 (1964). The government bears the
 28

burden of proving by a preponderance of the evidence that a confession is voluntary. Lego v. Twomey, 404 U.S. 477, 483 (1972).

In the instant matter, at least two impediments exist for the government to demonstrate that Mr. Smith's statements were voluntary. First, an implied promise of *not charging* him criminally preceded his statements to the interrogating agents. Second, Mr. Smith's military history as a distinguished Marine coupled with his being questioned by what amounted to a superior officer rendered his statements involuntary.

a. The Interrogating Agent Informed Mr. Smith that a Decision Whether or Not to Charge Existed.

Immediately after the Miranda warnings were provided, the interrogating agent explained to Mr. Smith that it was not his call about how much time he faced, whether he would be charged, *or would not be charged*. Those decisions were for others to make. Clearly, the suggestion that Mr. Smith potentially would not be charged depending upon the extent of how much he talked and told them fostered Mr. Smith into making statements. In light of this implied promise, of a significant benefit, Mr. Smith's statements were involuntary.

b. Mr. Smith's Statements Were the Product of an Inherently Coercive Setting and Were Made In Response to Questioning by a Superior Officer.

The unique environment which emanates from military relationships creates an inherently coercive setting of a soldier/officer being questioned by superior military officers. Because of a subordinate military person's obligation to respond to the command of his superior, merely asking a question under certain circumstances *may be equivalent to a command*. See United States v. Jones, 24 M.J. 367, 369 (CMA 1987). The coercive effect of the "subtle pressures which exist in military society," must be considered. United States v. Armstrong, 9 M.J. 374, 378 (C.M.A.1980). Jones referred to these pressures as "*i.e., the ethic of discipline and obedience and the pervasive presence of superior authority.*" United States v. Jones, 19 M.J. 961, 967 (ACMR 1985). Perhaps, however, it is best explained by United States v. Armstrong, 9 M.J. 374 (C.M.A.1980):

Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be

1 especially amenable to saying what he thinks his military superior wants him to say -
2 whether it is true or not.

3 Id. at 378. Similarly, United States v. Swift, 53 M.J. 439, 445 (CAAF 2000), explained:

4 In the armed forces, a person learns from the outset of recruit training to respond promptly
5 to the direct orders and the indirect expectations of superiors and others, such as military
6 police, who are authorized to obtain official information. Failure to respond to direct orders
7 can result in criminal offenses unknown in civilian life

8 In such an environment, a question from a superior or investigator is likely to trigger a direct
9 response without any consideration of the privilege against self-incrimination.

10 Id. at 445. Admittedly, Swift went on to state "The Article 31(b) warning [which is similar to Miranda]
11 requirement provides members of the armed forces with statutory assurance that the standard military
12 requirement for a full and complete response to a superior's inquiry does not apply in a situation when the
13 privilege against self-incrimination may be invoked." Id.; but see United States v. McCaig, 32 M.J. 751,
14 753 (ACMR 1991) (recognizing the inherent powers of the office of First Sergeant when questioning a
15 private); United States v. Kruempelman, 21 M.J. 725, 726-27 (ACMR 1985) (recognizing subtle pressures
16 created by rank and duty in military society which do not exist in civilian society); United States v. Ward,
17 19 M.J. 505, 507-08 (AFCMR 1984) (consent to search is not freely given if it amounts to no more than
18 acquiescence to the orders of a superior officer); United States v. Duga, 10 M.J. 206, 209 (CMA 1981)
19 (recognizing the pressures of superior rank upon one subject to military law such that the mere asking of
20 a question may be deemed to be a command).

21 Mr. Smith's statements to the ICE Special Agents must be suppressed because they were
22 involuntary. The inherently coercive setting of an officer, and former Marine Corps soldier, being
23 questioned by what is tantamount to superior officers without being allowed to first consult with an attorney
24 are events that render the statements involuntary. Wackenhut itself has a pseudo-military like structure with
25 an established chain of command and top-down authority scheme. Cf. Lincoln v. Wackenhut Corp., 867
26 P.2d 701 (1994) ("As a Wackenhut employee, Lincoln was required to follow a 'chain of command' to
27 address security problems or work-related incidents"). During his interrogation, Mr. Smith identified
28 various individuals in his office at Sergeant or Lieutenant, with superior ranks and command to his status
as supervisor of the day shift. Wackenhut's officials in the transport department in this case are referred to
as Transportation *Officers*, as opposed to officials. The Wackenhut officers wear uniforms, bear credentials,

1 etc. Furthermore, as a federal contractor, in this case to the United States Border Patrol, Wackenhut officers
2 are delegated responsibilities by that federal agency, which implicitly oversees Wackenhut's
3 duties/performance.

4 In addition to the command structure of Wackenhut, Mr. Smith's background as a decorated Marine
5 Corps soldier also plays into the calculus of whether his statements were voluntary. As the case law above
6 makes clear, this background only could have exasperated the involuntary nature of the statements.
7 Mr. Smith was a member of the corp from 1987, upon enlistment, through 1996, when he received an
8 honorable discharge. He ascended the ranks and in his final years was an instructor at the Corps's cold
9 weather unit training branch. Mr. Smith's repeated responses to some questions with a "yes, sir,"
10 demonstrates a superior/inferior officer relationship and the latter treating the former with due deference.
11 Cf. United States v. Elfayoumi, 66 M.J. 534, 355 (USAF 2008) (providing selection from questioning where
12 many responses by junior officer to senior one included "yes sir").

13 Each of these factors have been held to impact the voluntariness of a incriminating statement. See
14 e.g., Lego, 404 U.S. at 478 (to be admissible, a confession must be voluntary and not the outcome of
15 coercion which the Constitution forbids). Because Mr. Smith was put in a position of being questioned by
16 two officers of superior rank, one of which was the lead agent in the investigation, and because Mr. Smith
17 was afforded no attorney to counsel him in this situation, the incriminating statements that he made were
18 involuntary and must be suppressed. Lego, 404 U.S. at 483.

19 **C. Mr. Smith Requests That This Court Conduct An Evidentiary Hearing.**

20 This Court must make a factual determination as to whether a confession or statements were
21 voluntarily given prior to their admission into evidence. 18 U.S.C. § 3501(a). Where a factual
22 determination is required, courts are obligated by Fed. R. Crim. P. 12 to make factual findings. See
23 United States v. Prieto-Villa, 910 F.2d 601, 606-10 (9th Cir. 1990). Because ““suppression hearings are
24 often as important as the trial itself,”” id. at 609-10 (quoting Waller v. Georgia, 467 U.S. 39, 46 (1984)),
25 these findings should be supported by evidence, not merely an unsubstantiated recitation of purported
26 evidence in a prosecutor's responsive pleading.

27 Under section 3501(b), this Court must consider various enumerated factors in making the
28 voluntariness determination, including whether the defendant understood the nature of the charges against

1 him and whether he understood his rights. Without the presentation of evidence, this Court cannot
 2 adequately consider these statutorily mandated factors. Mr. Smith accordingly requests that this Court
 3 conduct an evidentiary hearing pursuant to 18 U.S.C. § 3501(a), to determine, outside the presence of the
 4 jury, whether any statements made by the defendant were voluntary.

5 IV.

6 **THE COURT SHOULD SUPPRESS THE INFORMATION DERIVED FROM THE SEARCH** 7 **OF THE CELLULAR TELEPHONE WITHOUT A WARRANT**

8 The Fourth Amendment of the United States Constitution protects "[t]he right of people to be secure
 9 in their persons, houses, papers, and effects, against unreasonable searches and seizures." Warrantless
 10 searches are per se unreasonable under the Fourth Amendment subject to only a few specifically established
 11 and well delineated exceptions. Mincey v. Arizona, 437 U.S. 385, 390 (1978). According to discovery
 12 disclosed to defense counsel, agents recovered several cellular telephones subsequent to arrest. Sometime
 13 thereafter, agents searched the memories of those cellular telephones and discovered various names and
 14 telephone numbers. The government may seek to admit such evidence at trial. The Court should preclude
 15 the government from doing so because the warrantless search of the telephone's memory violated Mr.
 16 Smith's Fourth Amendment rights.

17 First, this search occurred without a warrant and without Mr. Smith's voluntary consent. See United
 18 States v. Ward, 19 M.J. 505, 507-08 (AFCMR 1984) (consent to search is not freely given if it amounts to
 19 no more than acquiescence to the orders of a superior officer). The government has the burden of proving
 20 by clear and positive evidence that an unequivocal and specific consent was given, uncontaminated by any
 21 duress or coercion. See Channel v. United States, 285 F.2d 217, 219, 220 (9th Cir. 1960); Schneckloth v.
 22 Bustamonte, 412 U.S. 218, 222 (1973); Bumper v. North Carolina, 391 U.S. 543, 548 (1968). In United
 23 States v. Chan-Jiminez, 125 F.3d 1324 (9th Cir. 1997), the Court summarized the government's burden and
 24 factors to be taken into account in determining the voluntariness of consent: "[i]n order to establish the
 25 validity of a consent to search, the government bears the heavy burden of demonstrating that the consent
 26 was freely and voluntarily given. Whether consent to search was voluntarily given or not is 'to be
 27 determined from the totality of the circumstances.'" Id. at 1327 (quoting Schneckloth v. Bustamonte, 412
 28 U.S. at 227); see United States v. Torres-Sanchez, 83 F.3d 1123, 1129 -1130 (9th Cir. 1996); United States

1 v. Al-Azzawy, 784 F.2d 890, 895 (9th Cir.1985), cert. denied, 476 U.S. 1144 (1986); United States v.
 2 Alfonso, 759 F.2d 728, 740 (9th Cir.1985).

3 The Ninth Circuit has held that this Court should consider the following factors in determining
 4 whether a consent to search is voluntary: (1) whether the person was in custody; (2) whether the officer had
 5 his weapon drawn; (3) whether the officers failed to administer Miranda warnings; (4) whether the officer
 6 informed the person of his right to refuse consent; and, (5) whether the person was told that a search warrant
 7 could be obtained. See Chan-Jiminez, 125 F.3d at 1327; United States v. Welch, 4 F.3d 761, 763 (9th Cir.
 8 1993); United States v. Castillo, 866 F.2d 1071, 1082 (9th Cir.1988). Using the five factors in Chan-
 9 Jiminez, Welch and Castillo as a guide to determine the voluntariness of a consensual search, it becomes
 10 quite clear that the facts of the instant case (discussed above) demonstrate that any purported consent to the
 11 search of the telephones was not voluntary. Because the searches occurred without a warrant, and without
 12 his voluntary consent, and because no other exception to the warrant requirement applies, Mr. Smith's
 13 demands that any evidence seized as a result of this search be suppressed as well as any fruits thereof.

14 V.

15 **SIXTH AMENDMENT CONFRONTATION, CROSS-EXAMINATION AND DUE PROCESS** 16 **RIGHTS COMPEL SEVERANCE IN THIS CASE**

17 The Sixth Amendment guarantees the accused the rights to confront and to cross-examine witnesses
 18 against him. Lilly v. Virginia, 527 U.S. 116, 123-24 (1999); Bruton v. United States, 391 U.S. 123, 126
 19 (1968). This Court has the power to sever Mr. Smith's trial, and thus preserve his rights of confrontation
 20 and cross-examination. U.S. Const. amend VI; Fed. R. Crim. P. 14.

21 "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law
 22 required: unavailability and a prior opportunity for cross-examination." Crawford v. Washington, 124 S.Ct.
 23 1354, 1374 (2004). Although it declined to offer a "comprehensive definition" of "testimonial," the
 24 Crawford court certainly included "police interrogation" in that definition. Id. at 1364. The Supreme Court
 25 did, however, further define "testimonial" in a case subsequent to Crawford: "[T]o be testimonial, an
 26 accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose
 27 information." Hiibel v. Sixth Judicial District Court, 542 U.S. 177, 189 (2004) (quotations in original).

1 Under the definition of "testimonial" set forth in Crawford and Hiibel, the post-arrest statements by
2 Mr. Saint clearly related factual assertions and disclosed information that the government will seek to
3 introduce against Mr. Smith at trial. Such evidence, however, introduced without affording Mr. Smith the
4 right to confront and cross-examine Mr. Saint, will violate Mr. Smith's rights under the Sixth Amendment.
5 Thus, this is not just a Bruton v. United States, 391 U.S. 123 (1968), issue about whether a post-arrest
6 statement implicates Mr. Smith. If statements are testimonial and the defendant has not had a prior
7 opportunity to cross-examine the declarant, then the statements are inadmissible under Crawford. There
8 is nothing in Crawford which suggests that there is a "this would been admissible under Bruton" exception.
9 Indeed, the whole logic of Crawford disproves that thesis. Accordingly, this Court must sever Mr. Smith's
10 trial from that of Mr. Saint.

11 "It is well-established that the out-of-court statements of a non-testifying defendant, even if
12 admissible against the declarant, may not be used against a jointly tried codefendant unless otherwise
13 independently admissible against that codefendant." United States v. Molina, 407 F.3d 511, 517-18 (1st
14 Cir. 2005) (citing Lilly, 527 U.S. at 124; Bruton, 391 U.S. at 128; and Crawford, 124 S. Ct. at 1374.).
15 Molina specifically recognizes that Crawford displaces the prior case law and holds that the Confrontation
16 Clause categorically bars the introduction of testimonial hearsay unless the accused previously has had the
17 opportunity to cross-examine the declarant.

18 Unless Mr. Saint testifies, there is a Confrontation Clause problem with admitting his statements
19 against Mr. Smith. That, standing alone, is sufficient reason to sever the trial. See Zafiro v. United States,
20 506 U.S. 534, 539 (1993) (noting that admission of inadmissible evidence against a codefendant
21 compromises a specific trial right of a defendant and is cause to sever the trial). Relatedly, if Mr. Saint does
22 not testify, any statements he made that are incriminating of Mr. Smith must be excluded pursuant to the
23 Supreme Court's holding in Bruton. See also Lilly, 527 U.S. at 131 ("we have over the years spoken with
24 one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants").

25 Rule 14 of the Federal Rules of Criminal Procedure requires severance or other relief whenever a
26 defendant may be prejudiced by joinder of defendants in an indictment or by joinder for trial altogether.
27 See United States v. Escalante, 637 F.2d 1197, 1201 (9th Cir. 1980); United States v. Lutz, 621 F.2d 940,
28 945 (9th Cir. 1980); United States v. Tousant, 619 F.2d 810, 813 (9th Cir. 1980). A decision to sever

multiple co-defendants' cases remains within the trial court's discretion. See United States v. Doe, 655 F.2d 920, 926 (9th Cir. 1981); United States v. Seifert, 648 F.2d 557, 563 (9th Cir. 1980). To warrant the issuance of a severance, the defendant must demonstrate that a joint trial is "so manifestly prejudicial that it outweighs the dominant concern with judicial economy and compels the exercise of the court's discretion to sever." Doe, 655 F.2d at 926 (citations omitted). See also Zafiro, 506 U.S. at 539. A joint trial would greatly prejudice Mr. Smith for several reasons.

First, without severance, the jury may find Mr. Smith guilty by association, impinging on his due process rights. It is important to note that "[n]either mere association and activity with a co-conspirator nor even knowledge of the conspiracy's existence . . . meets the standards [required] to link a defendant to the conspiracy charge." United States v. Peterson, 549 F.2d 654, 658 (9th Cir. 1977). "Mere association and activity with a co-conspirator does not meet the test." United States v. Basurto, 497 F.2d 781, 793 (9th Cir. 1974) (citation omitted). A jury ordinarily experiences great difficulty in following admonishing instructions and in keeping separate evidence that is relevant only to co-defendants. In most cases,

[a] co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.

Krulewitch v. United States, 336 U.S. 440, 454 (1949) (Jackson, J., Concurring). If a jury cannot compartmentalize the evidence that pertains to each defendant, the trial court runs the risk of allowing a conviction based upon a defendant's association with incriminating evidence alone. In this case, Mr. Smith runs the risk of conviction based upon Mr. Saint's alleged statements regarding his agreement with the undercover agent and alleged alien to transport them in exchange for a fee, not to mention allegations that Mr. Saint bragged to co-workers about his prior alien smuggling activity which could be admissible under FED. R. EVID. 404(b) if the government can satisfy its burden to admissibility.

The jury cannot reasonably be expected to compartmentalize the evidence as it relates to Mr. Smith alone. Cf. United States v. DeRosa, 670 F.2d 889, 898-99 (9th Cir. 1982) (noting that highly limited implicit connections between co-defendants may allow the jury to "easily compartmentalize the evidence"). Since Mr. Smith will likely be prejudiced by evidence admissible only against his co-defendant, his rights can only be protected by severance from him.

1 Second, the Court should also sever because the defendants may end up with antagonistic defenses.
2 Mr. Smith may claim at trial that he never intended to assist the alleged alien without anything and never
3 intended for Mr. Saint to succeed in his alien smuggling venture, but was merely driving himself to his
4 office and essentially stands in the shoes of a material witness. "Mutually exclusive defenses are said to
5 exist when acquittal of one codefendant would necessarily call for the conviction of the other." United
6 States v. Tootick, 952 F.2d 1078, 1081 (9th Cir. 1991). In Tootick, the Ninth Circuit noted that many facets
7 of antagonistic defenses create unacceptable prejudice towards co-defendants, including: (1) defense
8 counsel become essentially a second prosecutor, although defense counsel are not bound by the same
9 limitations as prosecutors; (2) perverse incentives are created that may affect a defendant's decision to
10 testify, positions on evidentiary issues, etc.; and, (3) jurors may convict both defendants rather than sort out
11 the complexities of antagonistic defenses, particularly given that it may appear that the prosecution is the
12 only party presenting a consistent case. Id. at 1082.

13 The chances that the defenses will become mutually antagonistic, or at least that Mr. Smith might
14 have an incentive to turn on Mr. Saint, are significant. Mr. Smith has very little involvement with Mr. Saint
15 during the course of events related by the undercover agent, alleged alien, and Mr. Saint himself. The
16 government might give a strong incentive for Mr. Smith to blame everything on Mr. Saint (i.e., argue that
17 Mr. Saint is guilty of smuggling aliens, but that he was just riding to his office). The Court can obviate that
18 problem, and the other problems addressed in this section, through severance.

19 Finally, it should be clear that Mr. Saint's statements are not usable against Mr. Smith. In Crawford,
20 the Supreme Court overruled twenty-four years of precedent, holding that: "where testimonial evidence is
21 at issue, . . . the Sixth Amendment demands what the common law required, unavailability and a prior
22 opportunity for cross-examination." 541 U.S. at 68. Prior to Crawford, "hearsay-type" evidence was
23 admissible if it fell within a "firmly rooted" hearsay exception or bore particularized guarantees of
24 reliability. See id.; see also Ohio v. Roberts, 448 U.S. 56, 100 S. Ct. 2531 (1980).

25 All the post-arrest statements of Mr. Smith's codefendant are obviously testimonial. The only time
26 statements are nontestimonial when made during police interrogation is if the primary purpose of the
27 interrogation is to enable police assistance to meet an ongoing emergency. Davis v. Washington, 126 S.Ct.
28

1 2266 (2006). This is not the circumstance present in this case. Instead, the statements were aimed at
2 “proving past events potentially relevant to later criminal prosecution.” Id.

3 It matters not that these statements might satisfy the Rules of Evidence; the new test is whether
4 evidence sought to be introduced is or is not “testimonial.” Id. at 61, 124 S. Ct. at 1363 (“Where testimonial
5 statements are involved, we do not think the framers meant to leave the Sixth Amendment's protection to
6 the vagaries of the rules of evidence”); see also id. at 69, 124 S. Ct. at 1374 (“Where testimonial
7 statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one
8 the Constitution actually prescribes: confrontation”).

9 Post-Crawford, several courts have not allowed the government to rely upon the rationale that certain
10 statements were not offered for the truth or were only offered show context or the effect on the listener
11 because “[u]nder the prosecution’s theory, every time a person says to the police ‘X committed the crime,’
12 the statement (including all corroborating details) would be admissible to show why the police investigated
13 X. That would eviscerate the constitutional right to confront and cross-examine one’s accusers.” United
14 States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004) (reversing where district court admitted officer’s
15 testimony about confidential informant’s statements even though government offered evidence not for the
16 truth but to show why certain actions were taken). In United States v. Nielsen, 371 F.3d 574 (9th Cir. 2004),
17 the Court reversed a conviction where the trial court admitted a government agent’s testimony about the
18 statements of the defendant’s girlfriend – made in response to police questioning – although the government
19 claimed they were offered not for their truth but to show why the agents took the actions they did. Also,
20 in United States v. Cromer, 389 F.3d 662, 674 (6th Cir. 2004), that court did not allow admission of
21 testimony from officer’s about confidential informants’ statements about and descriptions of the defendant
22 and his nickname “Nut” because it “explicitly, albeit not directly, informed the jury that someone had
23 implicated Nut in illegal activity.” Id.

24 No testimonial statement is exempted from the categorical rule of the Confrontation Clause simply
25 because they may be admitted to show “context,” “effect on the listener” or to provide the “ebb and flow”
26 of the conversation; to do allow that kind of evidence would eviscerate the Confrontation Clause. See Silva,
27 380 F.3d at 1020. Allowing that evidence would run counter to Crawford’s goal of replacing court-created
28 exceptions with categorical constitutional guarantees. See Crawford, 541 U.S. at 67-68 (“By replacing

1 categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.
2 Vague standards are manipulable, and, while that might be a small concern in run-of-the-mill assault
3 prosecutions like this one, the Framers had an eye toward politically charged cases . . . where the impartiality
4 of even those at the highest levels of the judiciary might not be so clear.”).

5 This Court, accordingly, should enter an order prohibiting the prosecution from introducing this
6 evidence unless it can also provide the declarant who made the statements.

7 **VI.**

8 **MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS**

9 Defense counsel requests leave to file further motions and notices of defense based upon information
10 gained in the discovery process as well as defense investigation. In particular, Mr. Smith intends to file,
11 at the least, motions to suppress statements.

12 **VII.**

13 **CONCLUSION**

14 For these and all the foregoing reasons, the defendant, Mr. Smith, respectfully requests that this
15 Court grant his motions and grant any and all other relief deemed proper and fair.

16 Respectfully submitted,

17
18
19 DATED: August 29, 2008

s/ Jason I. Ser
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	Case No. 08CR1969-JM
v.)	
)	
MANLEY LAMONT SMITH,)	CERTIFICATE OF SERVICE
)	
Defendant.)	
_____)	

Counsel for Defendant certifies that the foregoing pleading, is true and accurate to the best of his information and belief, and that a copy of the Defendant's Notice of Motions and Motions has been electronically served this day upon:

Mark Conover
Assistant U.S. Attorney
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Dated: August 29, 2008

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